

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTONIO ROBERT DEAN,

Defendant-Appellant.

UNPUBLISHED

May 17, 2005

No. 253340

Oakland Circuit Court

LC No. 02-182248-FH

Before: Gage, P.J., and Cavanagh and Griffin, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of delivery of 50 to 224 grams of cocaine, MCL 333.7401(2)(a)(iii), and conspiracy to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv). Defendant was sentenced to consecutive terms of ten to twenty years in prison for the delivery of cocaine conviction and one to twenty years in prison for the conspiracy to deliver cocaine conviction. We affirm.

I. Facts

Defendant and three codefendants¹ developed a plan to sell cocaine to Officer Martin Lavin, who was an undercover officer with the Royal Oak Police Department Directed Patrol Unit (DPU).² An inmate informant set up a three-way introductory phone conversation among himself, defendant, and Officer Lavin.

Defendant contacted Officer Lavin, stating that he had two ounces of cocaine available, and they agreed to meet at a restaurant in Oakland County. Officer Lavin brought one pound of marijuana with him to add to his credibility as a drug dealer and carried cash to buy the cocaine. Several other officers were present in and around the parking lot for surveillance and protection. Because defendant and codefendants indicated that they were not comfortable going through with the deal at the restaurant, they moved the deal to a restaurant in Wayne County.

¹ The four men were tried jointly.

² The DPU is a plainclothes narcotics enforcement unit.

The same four men eventually drove into the parking lot, and defendant emerged from the vehicle, walking toward Officer Lavin's car. Officer Lavin saw something large and white that appeared to be cocaine in defendant's hand. Officer Lavin gave the signal for the other officers to approach, jumped out of his car, and ordered defendant to the ground. Officer Lavin saw defendant place something behind the tire of Officer Lavin's car. After handcuffing defendant, Officer Lavin found two plastic bags containing cocaine behind the tire.³

II. Ineffective Assistance of Counsel

Defendant raises several issues regarding ineffective assistance of trial counsel. Whether a defendant has been denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id.* We review a trial court's findings of fact for clear error and questions of constitutional law de novo. *Id.*

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and that the resultant proceedings were fundamentally unfair or unreliable. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Defendant bears the heavy burden of overcoming the presumption that counsel's representation was effective, and he must overcome the presumption that counsel's performance constituted sound trial strategy. *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003); *LeBlanc*, *supra* at 578.

Defendant claims that he was denied effective assistance of counsel because his trial counsel failed to investigate and failed to present a defense. This claim is contrary to the record. Trial counsel's cross-examination of witnesses during trial and his closing argument show that his theory was that the police planted the cocaine behind the tire. Trial counsel argued that Officer Lavin was the only one who saw cocaine in defendant's hand and saw defendant reach behind the tire. Trial counsel made a point to establish that Officer Lavin had access to drugs from past crimes in the police evidence room, which is where he got the marijuana he brought to the meeting with defendant. Because defense counsel did present an adequate defense, this claim is without merit.

Defendant also argues that his trial counsel was ineffective because at the inception of his representation, he failed to argue any of the preceding counsel's motions,⁴ allegedly resulting in

³ The lab technician's report concluded that the substance was cocaine, the amounts in each bag being 27.53 grams and 27.77 grams.

⁴ Defendant's first attorney was allowed to withdraw due to a breakdown in communications. She made four motions prior to her withdrawal: motion for severance of trials, motion in limine regarding non-testifying codefendants' statements, request for assistance in locating and serving process upon a witness (the informant), and motion for entrapment hearing.

the trial court's ruling that all pre-arrest statements of the codefendants were admissible as coconspirators' statements.⁵ Unless independent proof of a conspiracy is shown by a preponderance of the evidence, out-of-court statements of a coconspirator are not admissible. *People v Burton (After Remand)*, 433 Mich 268, 281-282; 445 NW2d 133 (1989). Evidence of concert of action creates an inference of a conspiracy. *People v Cotton*, 191 Mich App 377, 393-394; 478 NW 2d 681 (1991). The record indicates that the prosecution sufficiently proved by a preponderance of the evidence that a conspiracy existed, independent of the pre-arrest statements of the coconspirators. The officers' testimony supported that they observed defendant and codefendants acting in concert in two different locations. Additionally, each codefendant's attorney argued the same motion and was likewise unsuccessful. As such, we find that defendant's trial counsel was not ineffective for failing to advocate a meritless position. *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003).

Defendant next argues that his trial counsel was unprepared for trial, as evidenced by counsel's statements at the pre-trial hearing, that he was in court on several other matters and had just received the case. This argument is without merit, however, because the trial court rescheduled the trial for three weeks later to allow counsel to adequately prepare. Further, when claiming ineffective assistance due to counsel's unpreparedness, a defendant must show prejudice resulting from the lack of preparation. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). Defense counsel's performance at trial did not fall below an objective standard of reasonableness, as counsel adequately cross-examined each witness, objected to improper statements made about defendant, and presented an adequate closing argument. The record also establishes that defense counsel had a comprehensive knowledge of the details of the case. Thus, defendant has failed to show that his trial counsel's performance fell below an objective standard of reasonableness or that any prejudice resulted from the alleged lack of preparation.

Defendant further argues that his trial counsel was ineffective because he allowed the entrapment hearing to be conducted after the trial without insisting on the informant being available as a witness for trial. Defendant claims that this error was prejudicial. The entrapment hearing was conducted after trial because the informant, who was being held in protective custody in federal prison, was not available to be in court before the trial. The trial court determined that rescheduling was not practical because it was a joint trial involving four defendants and four attorneys. The trial judge indicated his desire to get the trial completed so that if the four men were innocent the matter would no longer be hanging over their heads. Further, the trial judge stated that it would overturn the conviction if it determined that defendant had not been entrapped. The entrapment hearing was held after trial, and the trial court concluded that defendant was not entrapped. Therefore, holding the entrapment hearing after the trial did not result in prejudice to defendant, and it had no bearing on the outcome of the proceedings.

⁵ Defendant only presents an argument that failure to argue this motion constituted ineffective assistance.

Defendant next claims that his trial counsel was ineffective in failing to present any witnesses, in particular the informant and the lab technician responsible for testing the cocaine.⁶ Defendant further argues that his trial counsel was ineffective for failing to get the bags of cocaine fingerprinted by the lab technician.⁷ The only witnesses to the crime were the codefendants and the police involved in the set-up and surveillance. The police were cross-examined by defense counsel, as well as codefendants' counsel. Codefendants all invoked their Fifth Amendment right not to testify.

Decisions about what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). The failure to call witnesses or present other evidence constitutes ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *Id.* The decisions not to present the informant and lab technician as witnesses were matters of trial strategy. Neither the informant nor the lab technician could testify about anything that would have made a difference in the case, or that would have changed the outcome.⁸ Furthermore, defendant does not aver to specific testimony that any witnesses would have given that would have actually aided his defense.

Defendant next claims he did not receive effective assistance of counsel because his trial counsel created false evidence against him, deliberately conspired to convict him, had lunch with the trial judge to discuss keeping the lab technician from testifying, and had a conflict of interest.⁹ Defendant basically claims that defense counsel elicited false evidence against him and conspired with the prosecutor and trial judge to convict him, but he provides no evidentiary support for the claims. Nor does defendant provide support for his claim that defense counsel had lunch with the trial judge for the purpose of keeping the lab technician from testifying. He merely states that the prosecutor stated in open court that the two had a lunch break "on the lab technician." When a defendant alleges ineffective assistance of counsel, he must present a

⁶ The trial court dismissed this claim in its opinion and order on defendant's motion for a new trial and *Ginther* hearing. It found that defendant provided no evidence that, but for the failure of the informant to testify, the outcome of the trial would have been different, that trial counsel knew the informant would testify at the entrapment hearing, and that such testimony was not necessary to the actual trial itself.

⁷ The trial court also ruled on this claim, holding that defendant's trial counsel was not ineffective for failing to get the bags fingerprinted, because it would not provide significant evidentiary value, and was a reasonable decision. The only other matter the lab technician could have testified about was that the substance was cocaine and what the amount of cocaine in each bag was, which were both stipulated to before trial.

⁸ Defendant's argument is that the informant's testimony at the entrapment hearing that he told Officer Lavin that defendant could deal in large quantities of marijuana contradicted Officer Lavin's trial testimony that he was told by the informant that defendant dealt in large quantities of cocaine.

⁹ Defendant raises these arguments in his Standard 11 brief as a part of his claim of prosecutorial misconduct, but these apparently are claims of ineffective assistance of counsel and will be addressed as such.

record that factually supports his claim. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). We find nothing on the record supporting this claim. Additionally, if such a statement was made in open court, it is obviously not a case of secret collusion, as alleged. As such, this issue is without merit.

Defendant's conflict-of-interest claim stems from trial counsel's representation of the informant's codefendant and representation of the informant by trial counsel's alleged law partner.¹⁰ When claiming ineffective assistance due to defense counsel's conflict of interest, a defendant must show that an *actual* conflict of interest adversely affected his lawyer's performance. *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998) (emphasis added). Trial counsel stated that he was not aware that his former partner had represented the informant or that he had represented the informant's codefendant until the informant was testifying during the entrapment hearing—after completion of the trial. Defendant's trial counsel was immediately allowed to withdraw. No actual conflict existed at any time during defendant's representation, and there is no showing that any conflict adversely affected counsel's performance. Thus, this claim is meritless.

Defendant also argues that trial counsel's "slandorous statements" created a false record regarding defendant's character. Defendant specifically claims that his trial counsel indicated that he had a marijuana addiction. However, the challenged statement was made during the entrapment hearing, after trial, and only in the presence of the trial judge. Furthermore, defense counsel did not say that he believed defendant to have a marijuana addiction, but that the informant told Officer Lavin that defendant had a marijuana addiction. This claim is without merit.

Defendant has failed to show that trial counsel's performance fell below an objective standard of reasonableness and the outcome of the trial would have been different. Therefore, defendant has presented no error requiring reversal.

III. Defendant's Right to Testify

Defendant contends that the trial court failed to ascertain on the record whether defendant waived his right to testify, and further that trial counsel's refusal to allow defendant to testify is ineffective assistance of counsel. Defendant claims that a waiver of his right to testify cannot be presumed because it requires an on-the-record waiver, which the trial court did not accomplish.

There is no requirement that the trial court advise a defendant of the right to testify or make an on-the-record determination that a defendant has knowingly and intelligently waived that right. *People v Harris*, 190 Mich App 652, 661-662; 476 NW2d 767 (1991). Furthermore, a defendant's decision whether or not to testify is deemed a strategic decision best left to defendant and his counsel. *People v Martin*, 150 Mich App 630, 640; 389 NW2d 713 (1986). In this case,

¹⁰ Trial counsel's alleged law partner was his former law partner, but at the time of the trial and the representation at issue, the two were merely sharing office space. Defendant's trial counsel told the trial judge that he did not have knowledge of his former law partner's representation of the informant, and he and the informant both indicated that they had never formally met before.

there is no evidence that defendant ever expressed a desire to testify during trial. If a defendant decides not to testify or acquiesces in his attorney's decision that he not testify, the right to testify is deemed waived. *People v Simmons*, 140 Mich App 681, 684-685; 364 NW2d 783 (1985). Examining the record before us, there is no indication that defendant was prevented from testifying by either the trial court or his trial counsel, and, as noted, there is no requirement that defendant waive the right to testify on the record.

Defendant has not identified what specific testimony he could have offered that would have provided a substantial defense or would have made a difference in the outcome of the trial. He merely states that his testimony would have enhanced his defense because he could have testified about what he wrote in his presentence statement.¹¹ Defendant made no indication at any time during trial that he wanted to testify. Defendant has not shown that he was deprived a substantial defense, *Dixon*, *supra* at 398, thus, this ineffective assistance of counsel claim fails.

IV. Prosecutorial Misconduct

Defendant claims that he was denied due process and a fair trial by the prosecutor's misconduct in not revealing exculpatory evidence and "procuring" perjury.¹² We review claims of prosecutorial misconduct de novo to determine whether the defendant was denied a fair and impartial trial. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). To preserve claims of prosecutorial misconduct for review, a defendant must timely and specifically object. *Id.*; 669 NW2d 818 (2003); *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Because defendant failed to raise this issue at trial, we review his claims for plain error affecting his substantial rights. *Carines*, *supra* at 763; *Ackerman*, *supra* at 448. To avoid forfeiture under the plain error rule, defendant must establish that: (1) an error occurred; (2) the error was plain; (3) and the plain error affected defendant's substantial rights, i.e., it affected the outcome of the lower court proceedings. *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003), citing *Carines*, *supra* at 763.

Defendant first argues that the prosecutor purposely elicited false testimony from Officer Lavin regarding the training of "K-9 Johnny." Because the testimony concerning the police dog had no significant impact on the trial, it was not prejudicial. Officer Lavin testified that Johnny was an aggressive response dog trained to sniff narcotics. Defendant argues that Johnny has only the lowest certification available for police dogs, and that it was not established that Johnny was a trained narcotics sniffing canine. At trial, the only questioning that occurred regarding Johnny involved a search of the car after defendant's arrest, but no drugs were found. This testimony did not significantly bolster the prosecution's case, and there is no showing that it affected defendant's substantial rights.

Defendant next asserts that the prosecution failed to provide the chain of evidence in relation to the money that Officer Lavin brought to the restaurant to buy the cocaine. Defendant

¹¹ Defendant's presentence statement claims that Officer Lavin planted the cocaine, which is essentially the theory his defense counsel presented at trial.

¹² The prosecutorial misconduct claims are raised in defendant's Standard 11 brief.

was found guilty of *delivery* of cocaine. The prosecutor's failure to provide further information on the money Officer Lavin carried does not amount to prosecutorial misconduct. Thus, there was no plain error affecting defendant's substantial rights in this regard.

Defendant asserts that the prosecutor, trial judge, defendant's trial counsel, and a codefendant's counsel colluded to keep the informant's identity from the jury. Specifically, defendant's argument is that the informant was not credible and that police illegally accessed defendant's address and provided it to the informant. Defendant has failed to show that this alleged error would have made a difference in the outcome of the trial, as the informant's statements and any receipt of defendant's address were not directly relevant to the commission of the crime itself and were only briefly mentioned at trial. They did not affect defendant's substantial rights.

Defendant then claims that the DPU had no authority to function, arrest, and act outside of its jurisdiction when the crime and arrest took place in Wayne County, and further that defense counsel colluded to cover up this defect at trial. Defendant's trial counsel questioned Officer Lavin about his authority to act outside of Royal Oak and Oakland County. It was established that the city of Detroit had given prior approval of the DPU's actions. See MCL 764.2a(1)(b). Defendant wrongly claims that this is hearsay, as it was provided through direct testimony. Defendant states that no evidence existed that any officer actually witnessed a crime, as required for an officer to make an arrest outside their jurisdiction. See MCL 764.2a(1)(c). However, Officer Lavin testified to witnessing a crime, and the trial court found defendant guilty of both crimes as charged. Therefore, no plain error exists affecting defendant's substantial rights. Furthermore, defense counsel questioned Officer Lavin about whether DPU followed the procedures necessary to act outside their jurisdiction, so there was no attempt to cover up this alleged defect.

Defendant next claims that the prosecutor denied him *res gestae* witnesses at trial. A *res gestae* witness is one who witnessed some event in the continuum of a criminal transaction and whose testimony would aid in developing a full disclosure of the facts. *People v Long*, 246 Mich App 582, 585; 633 NW2d 843 (2001). Defendant asserts that he was entitled to confront a restaurant manager who turned off the lights while the crime occurred as a *res gestae* witness. There is no evidence that the manager was a witness to the crime or was necessary to fully develop the facts. Defendant offers nothing to support this assertion. Furthermore, defendant has failed to show that such testimony would assist his defense or change the outcome of the trial. In addition, defendant has not asserted that the prosecutor was aware of any witnesses in the restaurant. Pursuant to MCL 767.40a(1), the prosecution is only required to provide notice of *res gestae* witnesses "known to the prosecuting attorney or investigating law enforcement officers." We find no plain error affecting defendant's substantial rights in this regard.

Lastly, defendant argues he was denied materials he requested in violation of *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). To establish a *Brady* violation:

[A] defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings

would have been different. [*People v Lester*, 232 Mich App 262, 281-282; 591 NW2d 267 (1998) (citations omitted).]

Undisclosed evidence is only material if there is a reasonable probability that the result of the proceeding would have been different if the evidence been disclosed to the defense. *Id.* at 282. Defendant claims that he filed a motion for *Brady* materials, but he fails to identify what he requested. He also claims that he was denied access to the informant's LEIN information and information regarding the deals the informant made with the prosecutor for his cooperation. However, this information was not relevant to the trial. The informant did not testify at trial, and his credibility was not at issue. Defendant's convictions were based on the testimony of the officers. There is no showing that defendant was denied any materials, which if disclosed would have changed the outcome of the proceedings. *Id.*

Defendant's claim of cumulative error regarding prosecutorial misconduct fails because he has failed to establish any misconduct by the prosecutor, and the record supports that he received a fair and impartial trial. *LeBlanc, supra* at 591-592 n 12; *People v Hill*, 257 Mich App 126, 152; 667 NW2d 78 (2003).

Affirmed.

/s/ Hilda R. Gage
/s/ Mark J. Cavanagh
/s/ Richard Allen Griffin